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No. 96-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF CENTER FOR AUTO SAFETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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May 23, 1997

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MISCELLANEOUS

Amicus curiae respectfully submits this brief in support of the Petitioner. Letters of consent to the filing of this brief from the Petitioner and the Respondent have been filed with the Clerk.

STATEMENT OF INTEREST

Amicus curiae, Center for Auto Safety, files this brief to ensure that the Court is aware of the implications of the ruling in the court below. The Court's decision in this case will have a substantial impact not only on the future conduct of this particular case and any other suit involving General Motors Corporation in which Ronald Elwell could be called upon as a witness, but also on any lawsuit or government investigation into a matter on which a "whistleblower" might shed some light. In this respect, the ultimate resolution of the issues now before the Court will bear upon a wide range of circumstances, both within and outside of the automotive industry.

Center for Auto Safety ("CAS") is a nationwide, nonprofit consumer advocacy organization incorporated under the laws of the District of Columbia. Since its founding in 1970, CAS has worked toward improved safety, environmental responsibility, and fair dealing in the car industry. CAS has a distinguished track record of petitioning Federal agencies, including, most prominently, the National Highway Traffic Safety Administration ("NHTSA"), for rulemakings and enforcement actions. CAS played a substantial role in bringing about the recalls of 7 million Chevrolet vehicles for defective engine mounts in 1971, 15 million Firestone 500 tires for tread separation in 1978, 3.7 million Evenflo child seats for latch buckle defects in 1990, and 1.2 million Ford Pintos for their deadly fuel tank defect.

CAS has a particular interest in this litigation as a consequence of our involvement in the inquiries into the safety of the 1973-1987 General Motors pickup trucks with the so-called "sidesaddle" fuel tank configuration. We filed

the petition with NHTSA that resulted in an investigation into the safety of these trucks, an initial finding of the presence of a safety-related defect, and ultimately a settlement of that investigation.

It was a personal injury suit involving one such truck which led General Motors to pursue the Michigan court injunction at issue here. Ronald Elwell's testimony in that suit, *Moseley v. General Motors Corp.*, and others has provided substantial insight into General Motors' knowledge of the fuel tank defect and General Motors' attempts to prevent that defect from coming to light.

SUMMARY OF ARGUMENT

If the Court upholds the decision of the Eighth Circuit and thus permits the Michigan court injunction to bind litigants in other courts who were not party to the injunction proceeding, it will have at least two pernicious effects: First, and more significantly, by eliminating any inquiries into the General Motors corporate engineering knowledge of Ronald Elwell, it will substantially impair inquiries into (A) two of the most significant safety areas in all General Motors vehicles, fuel system integrity and occupant ejection, and (B) two of the most serious safety defects in automotive history, sidesaddle gas tanks on 10 million 1973-87 General Motors pickups that explode in crashes and Type III door latches on 40 million 1978-87 cars and trucks that open in crashes. Second, it will prevent any investigation into what, if any, of the information held by Ronald Elwell is actually entitled to attorney/client or work product protection in light of the crime/fraud doctrine.

Upholding the Michigan court's injunction would needlessly silence testimony that is clearly not subject to any claim of privilege. The broad language of the injunction bars Mr. Elwell from testifying not only to matters which would

comprise attorney/client communications, attorney work product, or trade secrets, but to any matter whatsoever in litigation involving General Motors. In the absence of a modification by the issuing court or consent of General Motors, the gag remains in effect. The injunction thus deprives both the General Motors sidesaddle gas tank defect burn victims and the Type III door latch ejection victims of evidence to which they are by all rights entitled.

Moreover, one of the most hard-fought battles in the already rancorous personal injury litigation involving the fuel system defect in the 1973-1987 General Motors pickup trucks has focused on whether attorneys representing General Motors (or General Motors employees working with those attorneys) assisted General Motors in the commission of a crime or a fraud, thus abrogating the attorney/client privilege. Parties raising this argument against General Motors have relied heavily on the damning revelations contained in Mr. Elwell's testimony. The Michigan injunction puts an end to such inquiries, regardless of their merits. In one fell swoop, the injunction both assumes the validity of General Motors' attorney/client privilege claims, and effectively prevents a litigant from obtaining and introducing evidence to refute that assumption.

ARGUMENT

I. TO GIVE EFFECT TO THE MICHIGAN INJUNCTION WOULD SHIELD INFORMATION FOR WHICH RESPONDENT HAS NO LEGITIMATE CLAIM TO PROTECTION

The decision in this case not only will determine whether Petitioners can rely on the testimony of Ronald Elwell, but it will also affect the rights of virtually all the victims in two of the most contentious series of product liability suits in recent memory. General Motors wants to

silence Ron Elwell from testifying about two major safety areas in which he has particular expertise because of his engineering experience gained while employed at General Motors for nearly 30 years. The first area is fuel-fed fires in motor vehicles, which account for about 4% of all passenger car and 5% of all light truck occupant deaths. Despite the adoption of an upgraded Federal Motor Vehicle Safety Standard 301, "Fuel System Integrity," the number of fire-related fatalities in crashes has increased from 1,300 in 1975 to over 1,800 in 1988.[1] The second area is occupant ejection through doors opening due to latch failure. In 1995, 9,257 vehicle occupants were killed when ejected through windows, doors, and other vehicle openings in crashes.[2]

The injunction which is the subject of this case grew out of a concern about the disclosure of information Mr. Elwell had obtained during his employment relevant to the safety of the fuel system of the company's 1973-1987 full-size pickup trucks. The fuel tanks on these trucks were not located between the sturdy frame rails of the vehicle, but rather were in a "sidesaddle" configuration — on the outside of the frame, between the body and the frame rail. The result of this unfortunate placement was an increase in the likelihood of post-collision fuel-fed fires in certain types of accidents. In 1995, one court found 183 "substantially similar incidents" involving these trucks. That is, the court found 183 accidents involving the same made and model of truck, with the same fuel system configuration, where the fuel tank(s) ruptured, fuel leaked, and a subsequent fire with injury resulted. *See* Order at 6 in *Bishop v. General Motors*

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[1]National Highway Traffic Safety Administration, "Motor Vehicle Fires in Traffic Crashes and the Effects of the Fuel System Integrity Standard," HS 807 675, p. xviii (November 1990).

[2] National Highway Traffic Safety Administration, "Traffic Safety Facts 1995," HS 808 471 at 103 (September 1996).

Corp., No. CIV-94-286-B (E.D. Okla., Aug. 1, 1995). Even former General Motors Chairman Robert Stempel testified in 1991 that the fuel tank defect had been the subject of at least eighty lawsuits. *See* Deposition of Robert C. Stempel at 58 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Oct. 30, 1991).

The injunction also impacts upon a group of lawsuits concerning the adequacy of General Motors' Type III door latch. During a ten year period lasting from the late 1970s through the late 1980s, General Motors manufactured approximately 40 million vehicles with these latches. In certain accidents, the impact forces cause the latch mechanism to deform in such a way that the fork bolt (the moving portion of the mechanism inside the door used to hold the door closed) "bypasses" the detent lever (the portion of the mechanism inside the door holding the fork bolt in the "closed" position). When this bypass occurs, the door opens freely, creating a substantially heightened risk of ejection and, hence, serious injury or death. General Motors has settled at least 55 suits arising out of this defect for a total of $67 million. *See* Order in *Hardy v. General Motors Corp.*, Case Nos. CV-93-56, -57 (Lowndes Cty. Cir. Ct., Ala., Oct. 23, 1996).

The Michigan court's injunction provides one glimpse of a course of conduct in which General Motors has engaged in an attempt to obfuscate the issues surrounding both the truck defect and the latch defect. General Motors has persistently missed deadlines, refused to comply with court orders, abused the discovery process, and, according to at least one General Motors engineer, systematically destroyed files the company knew would be relevant to litigation arising out of the defect. General Motors has done everything in its power to throw up roadblocks to the discovery of the truth of its misfeasance in the course of the development, production, and marketing of vehicles with these defects,

particularly the defective sidesaddle pickups. The injunction, however, is General Motors' most sweeping and therefore most dangerous effort to silence the debate over the safety of its product.[3]

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[3]General Motors' conduct in *Cameron, et al. v. General Motors Corp.*, Civil Action Nos. 6:93-1278-3, -1279-3, -1280-3 (D.S.C. Apr. 30, 1993), *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga. Oct. 30, 1991), *Bishop v. General Motors Corp.*, No. CIV-94-286-B (E.D. Okla. Aug. 1, 1995), and *Conkle v. General Motors Corp.*, Civil Action No. SC92CV730 (Muscogee Cty. Ct., Ga. 1992) serves as stark support for this proposition. In *Cameron,* General Motors ended up settling the lawsuit after having penalties imposed by the trial court judge, an appeal to the Fourth Circuit, a recusal of the original trial judge and a vacating of his orders, and a reinstatement of the bulk of those orders. General Motors' actions in *Moseley* were similarly obstreperous. Three times in 1991 and 1992 the Georgia court ordered General Motors to produce documents to the court for *in camera* review. General Motors never complied. In *Bishop,* after General Motors failed to produce its trial exhibits until days before trial, and even then failed to comply with the court's orders concerning the form and scope of those exhibits, the court took the extraordinary step of barring General Motors from using any trial exhibits. *See* Order at 9 in *Bishop; see also* Benjamin Weiser, *Judge Imposes a Rare Sanction on GM in Upcoming Pickup Truck Trial,* WASH. POST, Sept. 10, 1995, at A9. Further, in *Conkle,* a Type III door latch case, the General Motors' failure to respond to discovery resulted in a trial court order defaulting General Motors on the issue of liability in that wrongful death suit. The Georgia Court of Appeals later vacated that order in favor of a lesser, yet still effective, sanction against General Motors.

Finally, the late Theodore Kashmerick, a former General Motors engineer, testified that between 1981 and 1983, attorneys representing General Motors known as the "fire babies" purged his files of documents showing General Motors' knowledge of the fuel

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Although other General Motors employees have given damaging testimony in suits alleging a defect in these trucks, no testimony has proved so damning as that offered by Mr. Elwell. As an engineer with a substantial role in the development of the fuel system in the 1973-1987 trucks, Mr. Elwell has an in-depth knowledge of what General Motors knew about the defect, and when. Mr. Elwell has provided in testimony a detailed description of General Motors' aborted attempts to address the problem, as well as the company's attempts to cover up evidence suggesting the presence of a defect. For instance, Mr. Elwell has testified to the following:

- Even prior to the introduction of the sidesaddle gas tanks trucks to the market, several General Motors engineers, including Mr. Elwell, recommended different fuel tank configurations. These suggestions were ignored in the interest of marketing concerns. Deposition of Ronald E. Elwell at 53, 56-58 in *In the Matter of General Motors Pickup Truck Investigation — United States Department of Transportation,* (Nov. 29, 1994).

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[3](...continued)
tank defect. *See* Deposition of Theodore Kashmerick at 92-93 in *Elwell v. General Motors Corp.*, Case No. 91-115946-NZ (Wayne Cty. Cir. Ct., Mich., Nov. 5, 1991)("I even had the guys from [legal group] . . . come to my office, and they sat down, took my desk and my chairs and they sat down and went through all my file cabinets and took every damn thing they thought was a problem . . . . I didn't feel that I needed it and it was shredded, long gone."). It is revelations like Mr. Kashmerick's that have led at least two courts, one in *Cameron* and one in *Bishop,* seriously to consider refusing General Motors' claims of attorney/client privilege by operation of the crime/fraud doctrine. For further discussion, see § II, *infra.*

- General Motors crash-tested sidesaddle gas tank trucks modified to include steel shields protecting the tanks. Despite the apparent efficacy of these shields, General Motors opted not to use them for fear that it would create a perception that the tanks were unsafe. *Id.* at 72-74, 160.

- Blueprints detailing an alternative, safer fuel system design considered prior to introduction of the sidesaddle configuration have mysteriously disappeared and have not resurfaced. Deposition of Ronald E. Elwell at 138-140 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Aug. 13, 1991).

- General Motors presentations as early as 1972 recommended that "[t]he potential for fire, *i.e.*, fuel leaks, should not occur in collisions which produce occupant impact forces below the threshold level of fatality." Decision makers ignored this recommendation. Examination of Ronald E. Elwell at 34-42 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Jan. 15, 1993).

- General Motors withheld from Mr. Elwell, as well as from private litigants, certain crash tests General Motors had conducted demonstrating the extreme vulnerability of the fuel tanks in the 1973-1987 pickup trucks. Deposition of Ronald E. Elwell at 16-18 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., May 3, 1991). These twenty two tests conducted between 1981 and 1983 consisted of crashing a passenger car into the side of a General Motors Corporation pickup truck at a speed at which a vehicle occupant would in most cases survive the impact. According to Mr. Elwell, the fuel tanks on the test trucks "opened like melons." *Id.* at 17.

Further, early in his career at General Motors, Mr. Elwell worked as an engineer on door latches. His knowledge of the history of door latch development at General Motors, as well as his evaluation of the Type III door latch during his employment with General Motors, have provided key information about the state of General Motors' knowledge during the production of the Type III latch. *See, e.g.*, Examination of Ronald E. Elwell at 717-718 in *Hardy v. General Motors Corp.*, Case Nos. CV-93-56, -57 (Lowndes Cty. Ct., Ala., May 15, 1996)(testifying that he had informed General Motors representatives of his concerns for the safety of the latches, and that he had refused to testify in court to their safety).

Courts across the country have permitted Mr. Elwell to testify because they have not found the above matters to be entitled to attorney/client or work product protection. These matters do not derive from Mr. Elwell's involvement as part of General Motors' legal defense team, nor do they derive from another General Motors employee's involvement in legal defense. Indeed, a substantial portion of the matters to which Mr. Elwell has testified revolves around the recounting of events and conversations occurring *prior to* the introduction of the trucks to the market. These matters consist of communications and observations of General Motors engineers and designers acting in their capacity as engineers and designers.

For example, in 1972, Mr. Elwell along with two other engineers made a "Presentation on Fuel System Integrity" to General Motors' Vice President for Engineering that proposed "[a] recommended level of fuel system performance is given for front, side and rear impacts, and rollover, premised on the concept that *occupants involved in collisions which produce occupant impact forces below the threshold level of fatality should be free from the hazard of post-collision fuel fires.*" (Emphasis added.) This

recommendation goes to the very heart of the instant case, for it stands for the fundamental safety principle that if occupants survive the force or trauma of a crash, they should not die by fire. General Motors strongly contends that this document is privileged and opposes its introduction into not only judicial but also regulatory proceedings because it shows that General Motors engineers as early as 1972 proposed a level of crash fire safety that even today General Motors vehicles do not have.[4]

Without discovery and introduction into evidence of this document, Ronald Elwell is the crucial fact witness willing to testify if subpoenaed as to General Motors' engineering knowledge on crash fire safety in the early 1970s. Even in the *Moseley* litigation, only the first two pages of this document were allowed into evidence during Mr. Elwell's

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[4]In making an initial determination of a safety defect in 1973-87 General Motors C/K pickups, Secretary of Transportation Federico Peña relied on this document, as well as a February 15, 1972 memorandum analysis by James Steger on the development of General Motors' internal Design Directive No. 8-A, applicable to all of the company's cars and trucks, that there should be no fuel leakage in 30-mph front, side or rear impacts. U.S. Department of Transportation, "Engineering Analysis Report And Initial Decision That The Subject Vehicles Contain A Safety-Related Defect," 41 (Oct. 17, 1994). General Motors contended that both documents were privileged, *see* Letter dated March 17, 1993 from James A. Durkin, General Motors Legal Staff, to Secretary Federico Peña, but the National Highway Traffic Safety Administration ruled otherwise, finding that "they appear to be documents prepared by GM engineers at the request of other GM engineers." *See* Letter dated April 2, 1993 from Kathleen DeMeter, National Highway Traffic Safety Administration Assistant Chief Counsel, to James A. Durkin. All documents were entered in the public file of the National Highway Traffic Safety Administration's defect investigation of General Motors C/K pickup trucks, No. EA92-041, at 057577.

testimony, and that was over General Motors' objections that they were protected by attorney/client privilege. Without Elwell's testimony to authenticate and explain the engineering principles and history of the document, it is unlikely this document could have been utilized at trial.

Nonetheless, the decision below would shield this information from public scrutiny, and adversely affect the inquiry into the safety of the sidesaddle gas tank trucks and the Type III latches. This windfall to General Motors operates as a grave harm both to litigants and to courts. First, depriving claimants of the benefit of Mr. Elwell's first-hand knowledge of the defect would unduly and perhaps fatally hamper efforts to hold General Motors accountable for its wrongs. The injunction places victims at a disadvantage by denying access to materials which are admissible or which might lead to admissible evidence. Likewise, it hinders the courts' function as a finder of fact. A court cannot rest assured of the truth or accuracy of its findings when it is not privy to the most salient non-privileged information available.

Where, as here, there has been so much discovery abuse and concealment of safety hazards from the public on the part of General Motors, courts should broaden rather than restrict their inquiry into the facts of the conduct at issue. To give full effect to the Michigan court injunction — an injunction issued without notice to affected parties, much less a finding of fairness to the interests of those parties — would offend this principle.

II. THE MATTERS FOR WHICH RESPONDENT HAS SOUGHT PROTECTION UNDER THE INJUNCTION MAY NOT BE PRIVILEGED AT ALL

General Motors and its lawyers have been sanctioned numerous times for discovery abuses in litigation over the safety of its fuel systems and door latches. Indeed, General Motors has been sanctioned for discovery abuse in the instant case. Rather than let the case proceed to trial with a complete discovery record of all relevant documents, General Motors' strategy is to run the risk of its defense being struck. In at least two cases other than the instant case involving door latches or fuel systems, General Motors crossed the line and the trial judge struck the defense or all of General Motors' exhibits. *See* discussion of *Bishop* and *Conkle* litigations, supra, note 3.

General Motors' conduct both prior to and in the course of the lawsuits involving the sidesaddle gas tank trucks has spawned a substantial debate over its entitlement to raise attorney/client and work product claims in connection with the activities of its legal staff and representatives. Thus, aside from the clearly non-privileged matters discussed above, Mr. Elwell's knowledge meeting the formal requisites for attorney/client protection still may properly be subject to disclosure.

Although arguments for the application of the crime/fraud doctrine typically arise in criminal cases,[5] the

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[5]*See, e.g., United States v. Laurins,* 857 F.2d 529 (9th Cir. 1988)(tax fraud); *United States v. Townsley,* 843 F.2d 1070 (8th Cir. 1988)(suborning perjury); *In re Grand Jury Investigation* (continued...)

doctrine is also available to civil litigants. *See, e.g., In re A.H. Robins Co.,* 107 F.R.D. 2 (D. Kan. 1985)(pattern of misrepresentation in connection with Dalkon Shield intrauterine device).

The "crime/fraud" exception applies only in the very rarest of circumstances. A party may seek to use the doctrine to overcome an adversary's attorney/client privilege when a legal representative offers "advice in furtherance of a fraudulent or unlawful goal . . . ." *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983,* 731 F.2d 1032, 1038 (2d Cir. 1984). In balancing the competing values of facilitating sound legal advice and that of preventing crimes and frauds, the former must yield to the latter. For this reason, a "client's communications seeking . . . advice [in furtherance of a crime or fraud] are not worthy of protection." *Id.*

The party invoking the crime/fraud exception must make a prima facie showing that the party against whom the exception would operate (1) engaged in a crime, fraud, or otherwise unlawful act, and (2) that party sought legal advice in perpetuation of the offensive act or practice. *United States v. Zolin,* 905 F.2d 1344, 1345 (9th Cir. 1990). *See also In re Richard Roe Inc.,* 68 F.3d 38, 40 (2d Cir. 1995)(movant must demonstrate "probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."). More specifically, the moving party must make a threshold showing based on non-privileged evidence "sufficient to

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[5](...continued)
(Appeal of Schroeder), 842 F.2d 1223 (11th Cir. 1987)(tax fraud); *United States v. Ballard,* 779 F.2d 287 (5th cir. 1986)(bankruptcy fraud); *United States v. Dyer,* 722 F.2d 174 (5th Cir. 1983)(extortion under color of official right).

support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *United States v. Zolin*, 491 U.S. 554, 574-575 (1989).

Even under these stringent criteria, the evidence adduced in the sidesaddle truck suits, including the information provided by Mr. Elwell, makes out the prima facie case. As mentioned in note 3, *supra*, at least two courts have seen fit to consider the propriety of a party's invocation of the crime/fraud doctrine against General Motors. The courts in both the *Cameron* litigation in South Carolina and the *Bishop* litigation in Oklahoma entertained motions to apply the crime/fraud exception against General Motors, ultimately finding sufficient basis to merit an *in camera* review of documents relevant to the communications in furtherance of the unlawful conduct. Although neither case resulted in a final finding of crime/fraud, the fact that claimants have met the threshold requirements for this extraordinary measure strongly counsels in favor of further examination.

It is paradoxical, therefore, that the Michigan court's injunction would protect such communications by stopping the inquiry before it starts. The injunction appears to accept without substantial investigation that Mr. Elwell is privy to attorney/client and work product information, and that this information is inextricable from other matters Mr. Elwell came to know through his employment at General Motors. By operation of the injunction, General Motors bears no burden of claiming attorney/client or work product protection. Rather, the injunction creates an effective presumption that anything Mr. Elwell might know is privileged. Such a ruling is improvident and, as Petitioners argue, unconstitutional.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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